86-488

Supreme Court, U.S.
FILED
SEP 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ROBERT WAYNE POWELL, PETITIONER

VS.

THE STATE OF TEXAS, RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEALS, STATE OF TEXAS

14TH SUPREME JUDICIAL DISTRICT

LOREN A. DETAMORE
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1520 TEXAS AVENUE, SUITE 1114
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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Whether Petitioner was denied the minimum requirements of due process and equal protection of laws and the right to counsel guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution by admitting into evidence a State file without permitting Petitioner adequate time to review the evidence.

2. Whether Petitioner was denied effective assistance of counsel in violation of Petitioner's Sixth Amendment right to counsel when the Trial Court admitted into evidence the Probation Department file without permitting counsel adequate time to review the file and the Court further questioned Petitioner regarding a document not admitted into evidence.

3. Whether the Petitioner was denied the minimum requirements of due process

and equal protection of laws guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution where the Trial Judge examined evidence outside the record and was therefore not an impartial examiner.

4. Whether the Petitioner under the facts in this case was denied due process and equal protection of laws guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution by a presumption under Texas Law that in a bench Trial, the Trial Judge will disregard any improper testimony or inadmissable evidence.

5. Whether the "stacking" of the sentences in this case subjects Petitioner to cruel and unusual punishment and deprives Petitioner of due process in violation of Petitioner's rights under the Fifth and Eighth Amendments to the Constitution of the United States.

TABLE OF CONTENTS

	Page
Questions Presented.....	i
Table of Contents.....	iii
Table of Authorities.....	iv
Opinions Below.....	2
Jurisdiction.....	2
Constitutional Provisions Involved..	3
Statement of the Case.....	3
How Federal Questions Were Raised Below.....	4
Reasons For Granting Writ.....	7
Conclusion.....	16

Appendix:

A Orders of the 248th District Court Revoking Probation..... App. i

B The Opinion Below of the Court of Court of Appeals, 14th Supreme Judicial District..... App. xi

C Notices of Texas Court of Criminal Appeals Denying Discretionary Review..... App. xx

D Constitutional Provisions.. App. xxii

TABLE OF AUTHORITIES

CASES

GAGNON V. SCARPELLI, 411 U.S. 617, 93 S.CT. 1756 (1973)..... 4, 7, 10.

MORRISSEY v. BREWER, 408 U.S. 471, 92 S.CT. 2593 (1972)..... 4, 7, 12, 14.

NORTH CAROLINA v. PEARCE, 395 U.S. 711, 89 S.CT. 2072..... 6, 14, 15.

CONSTITUTION

FIFTH AMENDMENT..... 4, 5, 6, 16.

SIXTH AMENDMENT..... 5, 9.

EIGHTH AMENDMENT..... 16.

FOURTEENTH AMENDMENT..... 4, 5, 6, 16.

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14TH SUPREME JUDICIAL DISTRICT

Petitioner, ROBERT WAYNE POWELL prays that Writ of Certiorari issue to review the judgement of the Texas Court of Appeals, State of Texas, 14th Judicial District entered November 21, 1985. Petition for Discretionary Review was REFUSED by the Texas Court of Criminal Appeals.

OPINIONS BELOW

The Orders of the 248th District Court revoking Petitioner's probation are attached as Appendix "A". The opinion of the Court of Appeals, State of Texas, 14th Supreme Judicial District is attached as Appendix "B".

JURISDICTION

The Opinion of the Texas Court of Appeals, 14th Judicial District was "affirmed and filed" on November 21, 1985. The Petition for Discretionary Review was REFUSED by the Texas Court of Criminal Appeals on May 21, 1986 and rehearing was denied on July 9, 1986. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), Petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

On July 10, 1984, Petitioner in Cause No. 399824 as a result of plea negotiations was granted 9 years probation for the offense of Theft and in Cause No. 399847 as a result of plea negotiations was granted 9 years probation for the offense of Attempted Capitol Murder. On November 28, 1984, motions were filed in both cases to revoke Petitioners probation. After examining the evidence and hearing arguments of counsel, the Trial Court found that Petitioner committed a subsequent offense, failed to work at suitable employment, failed to pay probation fees, failed to reimburse the county for the Court Appointed Attorney, and failed to pay his fine (Volume II of

II-135,136). The Trial Court then assessed punishment at 9 years in each case with the sentences to run consecutively (Volume II of II-138,139).

HOW FEDERAL QUESTIONS WERE RAISED BELOW

1. In Petitioner's Motion for Rehearing of the Petition for Discretionary Review, it was pointed out that Petitioner's Attorney was denied the right to see the evidence and to effectively cross examine the witness and in effect denied Petitioner due process in conflict with Federal Law citing GAGNON VS. SCARPELLI 411 U.S. 617, 93 S. Ct. 1756, 36 L. Ed 2d 656 (1973) and MORRISSEY VS. BREWER 408 U.S. 471, 92 S.Ct. 2593, 33 L. Ed 2d 484 (1972). This is a denial of Petitioner's rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

2. In Appellant's Brief to the Court

of Appeals, 14th Supreme Judicial District of Texas, it was pointed out to the Court that the Trial Court questioned Petitioner regarding documents not admitted into evidence and thereby prevented Petitioner from having effective assistance of counsel. This is a right guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

3. On appeal to the Court of Appeals, 14th Supreme Judicial District of Texas, Petitioner argued that the bias of the Trial Judge deprived Petitioner of a fair hearing by an impartial trier of fact. As such it is a violation of Petitioner's rights under the Fifth and Fourteenth Amendments of the United States Constitution.

4. Petitioner through out the appeals process has alleged the rulings of the Trial Court were erroneous, evidence of

bias by the Trial Judge and such bias denied Petitioner due process. That the Trial Judge will disregard any improper testimony or inadmissable evidence is not a valid presumption.

5. On appeal to the Court of Appeals, Petitioner argued that the imposition of two nine year sentences to run consecutively upon revocation of probation was cruel and unusual and as such is a violation of Petitioner's rights under the 8th Amendment of the U.S. Constitution. On Motion for Rehearing to the Court of Appeals, Petitioner argued that the cumulative order effectively increased punishment from nine to eighteen years contrary to Texas Statutes and violates due process (Fifth and Fourteenth Amendments of the U.S. Constitution) under North Carolina v. Pearce 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1956).

REASONS FOR GRANTING WRIT

1. The Trial Court Denied The Minimum Requirements of Due Process As Set Forth By This Court When The Trial Court Failed To Provide Disclosure Of Evidence Against Him.

In Morrissey v. Brewer 408 U.S. 492,92 S.Ct. 2593 (1972), this Court established the minimum requirements of due process for a parole revocation. "They include ... (b) disclosure to the parolee of the evidence against him;...." S.Ct. at 2604. Gagnon v. Scarpelli, supra 93 S.Ct. at 1760 applies the conditions of parole revocation as found in Morrissey v. Brewer to probation cases.

The 14th Court of Appeals in its opinion does not attempt to refute that the trial court erred in admitting improper testimony or evidence inadmissable under Gagnon v. Scarpelli and Morrissey v. Brewer, supra. The opinion

states "[I]t can be assumed that the [trial] court disregarded such evidence." It should be pointed out that this Court did not decide the minimum requirements of due process include the disclosure to probation of part of evidence against him. Is there any rational basis for assuming the improper evidence did not enter into the trial judges decision as he ordered the accumulation of sentences? If this decision is upheld, is there any requirement for the State to disclose more than a small portion of the evidence against a probationer?

2. The Trial Court Denied Petitioner's Counsel The Right To Examine Petitioner's Probation File Prior to The Revocation Hearing and Inadequate Time During The Hearing, And Elicited Testimony Based On A Document Not Introduced Into Evidence In Conflict With An

Applicable Decision Of This Court And The Sixth Amendment To The Constitution Of The United States.

Prior to the revocation hearing, Counsel for Petitioner requested that he be permitted to review the probation file which request was denied by the trial judge (Rec. I of II-69). Thereafter the trial court admitted the file into evidence as State's Exhibit 1 without permitting counsel adequate time to review the exhibit (Rec. I of I-10).

The trial court asked Petitioner questions regarding a document not introduced into evidence during the hearing (Rec. I of I-130).

> "THE COURT; Did you put this on your Pre-trial Release Application? Did you supply the information to the Pre-trial Release--"

Nor was said document ever tendered to Counsel for Petitioner for admission into evidence. The trial court subsequently

revoked Petitioner's probations and for the first time included as part of the sentence in Cause Number 399,824 an order that sentences in the two cases will run consecutively (Rec. I of I-139).

This Court in Gagnon v. Scarpelli 411 U.S. 782, 93 S.Ct. 1756, 1759 (1973) stated

> "[T]here will remain certain cases in which fundamental fairness - the touchstone of due process - will require that the State provide at its expense counsel for indigent probationers or parolees."

This Court at page 1759 approved a prior holding that a probationer is entitled to be represented by appointed counsel at a combined revocation and sentencing hearing. This Court further noted

> "[In a] revocation hearing... [t]he State is represented, not by a prosecutor, but by a parole officer with orientation described above; formal procedures and rules of evidence are not employed"

This is not the case in Texas and in fact counsel was appointed to satisfy the

right to counsel and the requirements of due process. But can it be said that he had effective assistance of counsel when counsel has been denied the disclosure of evidence against probationer to which he is entitled.

3. The trial judge took an adversary position and elicited testimony from the Petitioner based on a document not introduced into evidence and as such was not a "neutral and detached" hearing body as required by the decisions of this Court.

In Texas, a probation revocation is an adversary proceeding. The State is represented by the District Attorney and his office. During the hearing on revocation in the instant case, the trial judge actively took part in introducing improper testimony. One of the require-

ments of due process set forth in Morrissey v. Brewer, supra at 2604 is that the hearing be before a "neutral and detached" hearing body. Can it be said that the judge was "neutral and detached" when he actively participates in an adversary proceeding in the introduction of improper testimony.

4. The Court of Appeals held that in a bench trial, it is presumed that the judge disregarded any improper testimony or inadmissable evidence. This presumption has no basis in fact and as such denies Petitioner due process of law.

The presumption that a judge will disregard improper evidence is a presumption built upon a presumption. It presumes the judge will recognize the evidence as having been improperly introduced. Were this the case, he would not have admitted it into the record. It

then presumes that after he recognized his error in admitting the evidence, he is able to disregard that evidence. But man is not like a computer whereby with a flip of a switch, memory will be erased. Man's decisions are based not only on his conscious memory but also his subconscious memory.

In the instant case, the presumption stated by the Court of Appeals runs counter to two other presumptions found in law. There is the presumption that a person will not do an act which has no utility. Thus it is presumed that the judge will make use of the improper testimony which he has elicited. The second contrary presumption is that a person is presumed innocent.

May the judge be not completely neutral and detached and it be presumed that his lack of neutrality and detachment did not affect his decision? This

is the effect of the opinion of the Court of Appeals but it is not the holding of this Court in Morrissey v. Brewer cited above.

5. The Trial Court Place Petitioner on Probation On July 10, 1984 For Two Nine Year Terms With The Probation Running Concurrently. Thereafter On January 18, 1985, The Trial Court In Retaliation For Petitioner Requesting His Right To A Revocation Hearing, Entered Its Order Cumulating The Sentences In Violation Of Petitioner's Due Process Guarantees And The Decision Of This Court.

In North Carolina v. Pearce 395 U.S. 711, 89 S.Ct. 2073 (1969), this Court said

> "In order to assure the absence of such motive, [retaliation], we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the

> reasons for his doing so must affirmatively appear." "And the factual data upon which the increase sentence is based must be made part of the record so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal."

In the instant case, Petitioner was originally sentenced to nine years probation in each of two cases with the sentences running concurrently. In nine years the punishment imposed would be complete. In response to a motion by the Prosecutor made near the end of the probation revocation hearing, the trial judge ordered Petitioners sentence to run consecutively thereby increasing his punishment from nine years to eighteen years. There was no affirmative reasons for taking such action stated by the trial judge in the record. As such, the action of the judge violated the principles laid down in North Carolina v. Pearce and said action is presumed to be

vindictive, cruel and unusual, and a denial of Petitioner's guarantees of due process of law under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a Writ of Certiorari be issued to review the Opinion of the Court of Appeals of Texas, 14th Supreme Judicial District.

Respectfully submitted this 7th day of September 1986.

LOREN A. DETAMORE
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(713) 224-3340
Counsel for Petitioner

MINUTES OF THE 248TH DISTRICT COURT OF
HARRIS COUNTY, T E X A S
AT THE NOVEMBER TERM, A.D. 1984

NO. 399847

ORDER REVOKING PROBATION AND SENTENCE
(JUDGEMENT REFORMED)
JANUARY 18, 1985

THE STATE OF TEXAS VS.
ROBERT WAYNE POWELL

Attorney for State: Assistant District Attorney KATHY GIANNUOLA
Attorney for Defendant: LOREN A. DETAMORE Appointed
Offence: Attempted Capital Murder
Plea: Not True
Punishment: 9 years confinement in the Texas Department of Corrections and no fine.
Date of Offense: March 16, 1984
Sentence to begin: November 28, 1984

This day this cause being again called the State appeared by her District Attorney as named above, and the defendant as named above was brought into open court in person, in charge of the Sheriff; either with his counsel as named above or waived counsel as indicated above. Then came on to be heard the motion of the State's Attorney that the

probation of defendant be revoked.

The Court having heard and considered said motion the defendant's plea thereto and the evidence submitted, it appears that on the 5th day of November, A.D. 1984, in the above District Court of Harris County, Texas said Defendant was finally convicted of a felony and his punishment assessed at confinement in the Texas Department of Corrections for a period of 9 years and $1,000.00 fine. The imposition of the sentence was suspended and the Defendant was placed on probation for a term of 9 years, and that said Defendant has violated the terms of his probation in that:

He committed the felony offense of burglary of a motor vehicle with the intent of committing theft; He failed to secure and maintain employment; failed to pay supervision fee for the months of

August, September and October 1984 and is in arrears of $59.00; failed to reimburse Harris County for compensation paid to appointed counsel for months of September, August and October 1984; and is presently $64.00 in arrears and failed to pay fine and court costs.

IT is therefore ORDERED, ADJUDGED AND DECREED by the Court that the order suspending the imposition of the sentence, and placing the defendant on probation, heretofore entered in this cause be, and the same is hereby revoked, and it is hereby ordered by the Court that the defendant be now sentenced herein in accordance with the judgement heretofore entered in this cause and in compliance with this order and further, it appearing to the Court that the ends of justice will best be served by a reformation of the judgement herein from 9 years and $1,000.00 fine to 9 years and

no fine confinement in the Texas Department of Corrections. It is therefore ordered, adjudged and decreed by the Court that this judgement be reformed and the penalty reduced from 9 years and $1,000 to 9 years and no fine in the Texas Department of Corrections.

And thereupon the said Defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof. Whereupon the Court proceeded, in the presence of said Defendant, to pronounce sentence against him as follows, to wit: "It is the order of the Court that the Defendant, named above who has been adjudged to be guilty of the offense indicated above, a felony, and whose punishment has been assessed at confinement in the Texas Department of Corrections for the period indicated above, be delivered by the

Sheriff of Harris County, Texas, immediately to the Director of Corrections of the State of Texas, or other person legally authorized to receive such convicts, and said Defendant shall be confined in said Department of Corrections for the period indicated above, in accordance with the provisions of the law governing the Texas Department of Corrections."

The said Defendant was remanded to jail until said Sheriff can obey the directions of this sentence.

Signed and entered this the 18th day of January, A.D. 1985

/s/ W. DENSEN
Judge, 248th District
Court of Harris County,
T E X A S

To which action of the court the Defendant then and there, in open Court excepted and gave notice of appeal to the Court of Appeals in the State of Texas,

Houston, Texas.

And inasmuch as said Defendant has given notice of appeal herein, execution of the Sentence is deferred to await the Judgement and order of our Court of Appeals in this behalf.

MINUTES OF THE 248TH DISTRICT COURT OF HARRIS COUNTY, TEXAS AT THE NOVEMBER TERM, A.D. 1984

ORDER REVOKING PROBATION AND SENTENCE

NO. 399824
JANUARY 18, 1985

THE STATE OF TEXAS VS. ROBERT W. POWELL
AKA ROBERT T. POORE
Attorney for State: Assistant District Attorney KATHY GIANNUOLA
Attorney for Defendant: LOREN A. DETAMORE
Offense: Theft
Plea: Not True
Punishment: 9 years confinement in the Texas Department of Corrections
Sentence to begin: November 28, 1984

This day this cause being again called the State appeared by her District Attorney as named above, and the defendant as named above was brought into open court in person, in charge of the Sheriff; and either with his counsel as named above or waived counsel as indicated. Then came on to be heard the motion of the State's Attorney that the probation of the defendant be revoked. The Court having heard and considered

said motion, the defendant's plea thereto and the evidence submitted, it appears that on the 10th day of July, A.D. 1984, in the above District Court of Harris County, Texas, said defendant was finally convicted of a felony and his punishment assessed at confinement in the Texas Department of Corrections for a period of 9 years. The imposition of the sentence was suspended and the defendant was placed on probation for a term of 9 years and that said defendant has violated the terms of his probation in that;

On or about November 5, 1984 he committed the felony offense of theft of an automobile in Harris County; He failed to secure and maintain employment.

It is therefore ordered, adjudged and decreed by the Court that the order suspending the imposition of the sen-

tence, and placing the defendant on probation, heretofore entered in this said cause be, and the same is hereby revoked, and it is hereby ordered by the Court that the defendant be now sentenced herein in accordance with the judgement heretofore entered in this cause and in compliance with this order.

The said Defendant was remanded to jail until said Sheriff can obey the directions of this sentence.

And credit the Defendant as indicated above.

Signed and entered on this the 18th day of January, 1985.

/s/ W. DENSEN
Judge, 248th District
Court of Harris County,
T E X A S

And it is further ordered by the Court that the punishment under the sentence here imposed shall begin when the judgement and sentence against this

defendant in criminal cause no. 399847 in the 248th District Court of Harris County, Texas wherein the defendant was on the 18th day of January A.D. 1985 duly and legally sentenced to serve a term of 9 years for the offense of attempted capital murder shall have ceased to operate.

To which action of the court the Defendant then and there, in open Court excepted and gave notice of appeal to the Court of Appeals in the State of Texas, Houston, Texas.

And inasmuch as said Defendant has given notice of appeal herein, execution of the Sentence is deferred to await the Judgement and order of our Court of Appeals in this behalf.

x

Affirmed and Opinion filed November 21, 1985.

ROBERT WAYNE POWELL, Appellant
No. B14-85-035CR
B14-85-044CR vs.
THE STATE OF TEXAS, Appellee

Appeal from the 248th District Court
of Harris County
Trial Court Nos. 399,824 and 399,847

OPINION

This is an appeal from an order revoking probation. We affirm.

On July 10, 1984, the appellant pleaded guilty to felony theft and attempted capital murder. He was assessed nine years probation and $1,000.00 fine for the murder to run concurrently with nine years probation for theft. The order of probation included the following terms and conditions:

> (a) Commits no offense against the laws of this or any other State or of the United States.
>
> (e) Work continuously at suitable employment and notify the Probation Officer within 48 hours of any change in employment status...

> (o) Pay a Supervision Fee to the Harris County Adult Probation Department at the rate of $15.00 per month for the entire period of probation...
>
> (q) Reimburse Harris County for Court appointed attorney fees in the amount of $1,000.00 at the rate of $20.00 per month...
>
> (r) Pay a fine of $1,000.00 and Court costs of $41.00 for a total of $1,041.00 at the rate of $25.00 per month.

On November 28, 1984, the State filed a Motion to Revoke Probation based on violations of these conditions. At the hearing, the trial court found that appellant did commit an offense against the laws of the state, did fail to work continuously at suitable employment, did fail to pay supervisory fee, and did fail to reimburse Harris County for the court appointed attorney. The court revoked probation in both cases.

The pertinent facts show that appellant telephoned David McDavid Datsun to lease a 1985 Maxima. Relying on false

information given by appellant, the dealer's employee filled out a credit application which was signed by the appellant when he picked up the car. Appellant used a false name, an incorrect driver's license number, an erroneous bank account number and lied in saying he was employed by Gulf Industries with a salary of $4,000 per month. In addition, the check he gave for the downpayment was on a closed account. David McDavid Datsun filed charges against appellant for theft of an automobile. Appellant agreed to return the car if the charges were dropped. The trial court found that this was a violation of his probation.

Appellant brings five counts of error. In the second, he contends that the trial court erred in revoking his probation on the allegation of theft of property rather than the theft of service. In the third, he asserts that the evidence is

(o) Pay a Supervision Fee to the Harris County Adult Probation Department at the rate of $15.00 per month for the entire period of probation...

(q) Reimburse Harris County for Court appointed attorney fees in the amount of $1,000.00 at the rate of $20.00 per month...

(r) Pay a fine of $1,000.00 and Court costs of $41.00 for a total of $1,041.00 at the rate of $25.00 per month.

On November 28, 1984, the State filed a Motion to Revoke Probation based on violations of these conditions. At the hearing, the trial court found that appellant did commit an offense against the laws of the state, did fail to work continuously at suitable employment, did fail to pay supervisory fee, and did fail to reimburse Harris County for the court appointed attorney. The court revoked probation in both cases.

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information given by appellant, the dealer's employee filled out a credit application which was signed by the appellant when he picked up the car. Appellant used a false name, an incorrect driver's license number, an erroneous bank account number and lied in saying he was employed by Gulf Industries with a salary of $4,000 per month. In addition, the check he gave for the downpayment was on a closed account. David McDavid Datsun filed charges against appellant for theft of an automobile. Appellant agreed to return the car if the charges were dropped. The trial court found that this was a violation of his probation.

Appellant brings five counts of error. In the second, he contends that the trial court erred in revoking his probation on the allegation of theft of property rather than the theft of service. In the third, he asserts that the evidence is

insufficient to prove an intent to deprive owner of property without his consent.

Theft of property consists of the following elements: (1) with intent to deprive (2) the owner (3) of property, the actor (4) obtains the property or exercises control over the property (5) unlawfully. Texas Penal Code Ann. 31.03 (Vernon 1974). Specific intent to commit theft can be inferred from surrounding circumstances. Coronado v. State, 508 S.W.2d 373 (Tex. Crim. App. 1974); Hudson v. State, 675 S.W.2d 320 (Texas App.-Dallas [5th Dist.] 1984, pet. ref'd.). Here appellant gave false information which indicated an intent to defraud the dealer. After being asked to return the car, he did not until after he was arrested. Appellant never gave a reasonable explanation of how he considered the property to be honestly acquired.

Appellant also asserts that he took the car with the consent of the owner. Consent is vitiated, however, when it is induced by deception. Ashby v. State, 604 S.W.2d 897 (Tex. Crim. App.1980). Appellant knew and admitted that he could not have leased the car except by deception. The owner's consent was based entirely on appellant false information; hence, there was no consent.

Appellant asserts that if he is guilty of anything, it is theft of services. Texas Penal Code Ann. 31.04 (Vernon 1974). However, in Prowell v. State,541 S.W.2d 432 (Tex. Crim. App. 1976), the court held that theft of services would apply to the rental of a car only when there was no arrangement for credit. Here appellant signed a credit application and agreed to make monthly payments. The second and third grounds of error are overruled.

In his first ground of error, appellant argues that the evidence was insufficient to show that he failed to work and to pay his fees, fines, and costs. Since one ground is sufficient to revoke probation, we do not need to address this ground of error. Moore v. State, 605 S.W.2d 924 (Tex. Crim. App. 1980).

In his fourth ground of error, appellant argues that an order which gives a cumulative sentence and assesses the maximum penalty is cruel and unusual punishment. When probation is revoked, the court may dispose of the case as if there had been no probation. Texas Code of Criminal Proc. Ann. art. 42.12 sec. 8(a) (Vernon 1981). When, as in this case, the judge assesses punishment within the limits prescribed by law, the punishment is not cruel and unusual. Samuel v. State, 477 S.W.2d 611 (Tex.

Crim. App. 1972). After revocation of probation in two or more cases, a trial judge is authorized to cumulate sentences. Gordon v. State, 575 S.W.2d 529 (Tex. Crim. App. 1978). Appellant has not adequately shown that it would be in his and society's best interest to impose a shorter term of imprisonment. The fourth ground of error is overruled.

In his fifth ground of error, appellant argues that the trial court was biased, and he was thereby deprived of due process. In alleging bias, appellant complains of the court's: (a) admitting the probation officer's files,(b) admitting copies, rather than originals, of bank statements, (c) questioning the appellant about a document not in evidence, (d) denying appellant's motion to dismiss the allegation concerning fees and work, and (e) assessing punishment consecutively. In a bench trial, it is

presumed that the judge disregarded any improper testimony or inadmissable evidence. Ex Parte Le Blanc, 615 S.W.2d 724 (Tex. Crim. App. 1981); Ozack v. State, 646 S.W.2d 941 (Tex. Crim. App. 1983). Even assuming that appellant's first three points are true, it can be assumed that the court disregarded such evidence. Moreover, there is sufficient evidence to support the court's judgement without the aid of any inadmissable evidence. Appellant's items (d) and (e) have been discussed herein above. They do not indicate any bias on the trial court's part. The fifth ground of error is overruled.

The Judgement of the trial court is affirmed.

/s/ PAUL PRESSLER
Associate Justice

Judgement Rendered and Opinion filed November 21, 1985.
Panel consists of Associate Justices Pressler, Murphy and Draughn.

No Publication Tex. Cr. App. R. 207

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

Re: Case No. 0142-86
Style: POWELL, ROBERT WAYNE,
aka POORE, ROBERT T.

May 21, 1986

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.
COA#: 14-85-00035-CR Thomas Lowe, Clerk

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

Re: Case No. 0143-86
Style: POWELL, ROBERT WAYNE

May 21, 1986

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.
COA#: 14-85-00044-CR Thomas Lowe, Clerk

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

Re: Case No. 0142-86
Style: POWELL, ROBERT WAYNE
aka POORE, ROBERT T.

July 9, 1986

On this day, the Appellant's Motion for Rehearing was DENIED.
COA#: 14-85-00035-CR Thomas Lowe, Clerk

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

Re: Case No. 0143-86
Style: POWELL, ROBERT WAYNE

July 9, 1986

On this day, Appellant's Motion for Rehearing was DENIED.
COA#: 14-85-00044-CR Thomas Lowe, Clerk

APPENDIX "D"

CONSTITUTIONAL AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and

subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.